

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLUMBIA PARK GOLF COURSE,
INC., a Washington
corporation,

Plaintiff,

v.

CITY OF KENNEWICK, a
municipal corporation in and
for the State of Washington;
JAMES R. BEAVER, Mayor of
Kennewick; ROBERT HAMMOND,
City Manager of Kennewick;
and JOHN S. ZIOBRO, City
Attorney for Kennewick,

Defendants.

NO. CV-07-5054-EFS

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, GRANTING AND DENYING
IN PART DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
FEDERAL CLAIMS, AND GRANTING
AND DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT RE: CONTRACT CLAIMS**

Before the Court, without oral argument, are Plaintiff Columbia Park Golf Course's (CPGC) Motion for Partial Summary Judgment Re: Violation of 42 U.S.C. § 1983 (Ct. Rec. 66); Defendants City of Kennewick, James Beaver, Robert Hammond, and John Ziobro's (hereinafter, collectively referred to as "Defendants") Motion for Partial Summary Judgment on Federal Claims (Ct. Rec. 79); and Defendants' Motion for Summary Judgment Re: Contract Claims (Ct. Rec. 82). After reviewing the submitted material and relevant authority, the Court is fully informed and denies CPGC's motion and grants and denies in part Defendants' motions. The reasons for the Court's Order are set forth below.

1 **A. Uncontroverted Facts**

2 Columbia Park is a municipal park located in the City of Kennewick
3 ("the City") between the south bank of the Columbia River and State Route
4 (SR) 240, generally west of the SR 395 bridge. Columbia Park is owned
5 by the United States and is administered by the Corps of Engineers ("the
6 Corps"). Initially, the Corps leased Columbia Park to Benton County,
7 which in turn subleased to the City that portion of Columbia Park within
8 the City's boundaries. On March 26, 2004, the Corps leased the portion
9 of Columbia Park within the City's boundaries to the City directly.

10 On March 21, 2000, CPGC's predecessor in interest¹ and the City
11 executed the Columbia Park Golf Course Lease Agreement (hereinafter,
12 referred to as "the sublease") for the golf course property located
13 within Columbia Park. The Corps approved the sublease on April 14, 2003,
14 CPGC's predecessor in interest and the City executed an addendum to the
15 sublease. The Corps approved this addendum.

16 CPGC² and the City entered into a Development Option Agreement (CPGC
17 DOA) on April 16, 2005. On October 20, 2005, CPGC submitted its
18 Shoreline Management Permit to the City. The application contained an
19 initial site plan, which included replacing the driving range with an RV
20 park and replacing the club house (hereinafter, referred to as "the RV
21 project"). On May 2, 2006, the City Council approved CPGC's application
22 with Resolution 06-14.

23
24 ¹ Prior to 2004, CPGC was named Golf Universe, Inc., Golf Universe
25 Management, Inc., and Solaris, Inc.

26 ² CPGC is a corporation organized and existing under Washington
laws and doing business in Benton County.

1 In the fall of 2005, Aaron Beasley with the Three-Rivers Sports
2 Facility (TRSF) approached the City and proposed developing a multi-
3 purpose community center within Columbia Park. TRSF met with City
4 officials on November 7, 2005. On February 21, 2006, the City and TRSF
5 entered into a Development Option Agreement (TRSF DOA).

6 CPGC filed this lawsuit in state court, and Defendants removed the
7 action on February 27, 2007. (Ct. Rec. 1.) CPGC contends the City
8 breached the CPGC DOA by entertaining the TRSF's project and by
9 disallowing the RV project to be located at the golf course. CPGC
10 contends Defendants' conduct also supports claims under 42 U.S.C. § 1983,
11 a breach of the implied covenant of good faith and fair dealing claim,
12 a promissory estoppel claim, and an unjust enrichment claim. Defendants
13 oppose CPGC's claims. The parties filed the instant motions in December
14 2007 and early 2008.

15 **B. Summary Judgment Standard**

16 Summary judgment is appropriate if the "pleadings, the discovery and
17 disclosure materials on file, and any affidavits show that there is no
18 genuine issue as to any material fact and that the moving party is
19 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once
20 a party has moved for summary judgment, the opposing party must point to
21 specific facts establishing that there is a genuine issue for trial.
22 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving
23 party fails to make such a showing for any of the elements essential to
24 its case for which it bears the burden of proof, the trial court should
25 grant the summary judgment motion. *Id.* at 322. "When the moving party
26 has carried its burden of [showing that it is entitled to judgment as a
matter of law], its opponent must do more than show that there is some

1 metaphysical doubt as to material facts. In the language of [Rule 56],
2 the nonmoving party must come forward with 'specific facts showing that
3 there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v.*
4 *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted)
5 (emphasis in original opinion).

6 When considering these motions for summary judgment, the Court did
7 not weigh the evidence or assess credibility; instead, the Court viewed
8 the evidence and all justifiable inferences in the light most favorable
9 to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
10 242, 255 (1986). This does not mean that the Court accepted as true
11 assertions made by the non-moving party that are flatly contradicted by
12 the record. See *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). Because
13 both parties filed motions for summary judgment, the Court, when
14 addressing a specific issue, viewed the evidence in the favor of the non-
15 moving party on that particular issue.

16 **C. 42 U.S.C. § 1983**

17 Both parties seek entry of judgment in their favor on CPGC's 42
18 U.S.C. § 1983³ substantive due process claim. In addition, Defendants
19 ask the Court to enter judgment in their favor on CPGC's procedural due
20

21 ³ Section 1983:

22 Every person who, under color of any statute, ordinance,
23 regulation, custom, or usage, of any State or Territory or the
24 District of Columbia, subjects, or causes to be subjected, any
25 citizen of the United States or other person within the
26 jurisdiction thereof to the deprivation of any rights,
privileges, or immunities secured by the Constitution and laws,
shall be liable to the party injured in an action at law, suit
in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

1 process, equal protection, and impairment of contract claims brought
2 under § 1983. To prove a violation of § 1983, CPGC must establish two
3 elements: (1) a person acting under color of law (2) deprived CPGC of
4 rights guaranteed by the United States Constitution. 42 U.S.C. § 1983.

5 It is undisputed that Defendants acted under color of law.⁴ Whether
6 CPGC presented sufficient evidence to survive summary judgment on its
7 substantive and procedural due process, impairment of contracts, equal
8 protection, and conspiracy to violate equal protection claims is
9 addressed below.

10 1. Standing

11 First, the Court addresses Defendants' argument that CPGC lacks
12 standing because its interests are based on contract and not land
13 ownership. In order for a case or controversy to exist that creates
14 Court jurisdiction, CPGC must have standing. See *Lujan v. Defenders of*
15 *Wildlife*, 504 U.S. 555, 560 (1992). "The existence of standing turns on
16 the facts as they existed at the time the plaintiff filed the complaint."
17 *Skaiff v. Meridien N. Am. Beverly Hills*, 506 F.3d 832, 838 (9th Cir. 2007)
18 (citing *Lujan*, 504 U.S. at 569 n.4). A litigant must establish injury
19 in fact, causation, and redressability. *Lujan*, 504 U.S. at 560. "Injury
20 in fact" requires "an invasion of a legally-protected interest which is
21 concrete and particularized and actual or imminent, not conjectural or
22 hypothetical." *Id.*; see also *N.E. Flor. Chapter of Assoc. Gen.*

23
24 ⁴ For purposes of § 1983, the City, as a municipality, is a
25 "person." *Long v. County of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006).
26 Defendants Mayor James Beaver, City Manager Bob Hammond, and former City
Attorney John Ziobro were at all material times City officials.

1 *Contractors. of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993).
2 Upon review of the Complaint, the Court concludes CPGC alleged sufficient
3 facts to establish a redressible injury in fact proximately caused by
4 Defendants. Accordingly, the Court finds CPGC has standing.

5 2. Substantive Due Process

6 To prove a violation of a substantive due process right, CPGC must
7 establish (1) the deprivation of a protectible property interest (2) by
8 means that were arbitrary and capricious. *Wedges/Ledges of Cal. v. City*
9 *of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); 1 Civ. Actions Against State
10 & Loc. Gov't 7:38 (2008). Defendants contend that CPGC cannot satisfy
11 either of these requirements and, additionally, argue that CPGC's
12 substantive due process claim is trumped by the Fifth Amendment takings
13 clause.

14 a. Fifth Amendment

15 The Court finds CPGC's substantive due process claim, if successful,
16 is not barred by the Fifth Amendment in light of the Ninth Circuit's
17 recent decision *Action Apartment Association v. Santa Monica Rent Control*
18 *Board*, 509 F.3d 1020 (9th Cir. 2007). In *Action Apartment Association*,
19 the Ninth Circuit stated, "An arbitrary deprivation of [a landowner's
20 constitutionally protected property interest], thus, may give rise to a
21 viable substantive due process claim in any case in which the Takings
22 Clause does not provide a preclusive cause of action." *Action Apartment*
23 *Ass'n*, 509 F.3d at 1026. Although CPGC is a leaseholder and not a
24 landowner, the Court determines the Takings Clause does not preclude
25 CPGC's substantive due process claims. Accordingly, the Court addresses
26 the merits of CPGC's substantive due process claim below.

1 b. Protectible property interest

2 To have a substantive due process claim, a plaintiff must be
3 deprived of a "particular quality of property interest." *Indep.*
4 *Enterps., Inc. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1179-80
5 (3d Cir. 1997) (declining to define the "precise contours of the
6 'particular quality of property interest' entitled to substantive due
7 process protection"). "A mere 'unilateral expectation' of a benefit or
8 privilege is insufficient; the plaintiff must 'have a legitimate claim
9 of entitlement to it.'" *Nunez v. City of L.A.*, 147 F.3d 867, 872 (9th
10 Cir. 1998). The substantive interest may be created by the Constitution
11 or by state law; however, federal constitutional law determines whether
12 that interest rises to the level of a "legitimate claim of entitlement."
13 *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting
14 *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); see *Mid-Am. Waste Sys.*
15 *v. City of Gary, Ind.*, 49 F.3d 286, 290 (7th Cir. 1995). A property
16 interest arises where the government lacks discretion in granting or
17 recognizing the interest at issue. *Wedges/Ledges of Cal.*, 24 F.3d at 62.

18 CPGC asserts its protectible property interest is created by
19 Washington's vested rights doctrine. The vested rights doctrine states
20 that a successful permit applicant has the right to develop the property
21 consistent with the codes and ordinances in effect at the time of the
22 permit application. *W. Main Assoc. v. City of Bellevue*, 106 Wn.2d 47,
23 50 (1986); *Talbot v. Gray*, 11 Wn. App. 807, 811 (1974) (citing *Eastlake*
24 *Cmty. Council v. Roanoke Ass'n, Inc.*, 82 Wn.2d 475 (1973)); *Hull v. Hunt*,
25 53 Wn.2d 125, 130 (1958). Relying on the vested rights doctrine, CPGC
26 argues it has a vested interest to pursue the RV project at the golf

1 course location, absent violating the Kennewick Municipal Code, based on
2 its Shoreline Management Permit. The Court concludes otherwise.

3 CPGC's rights to occupy and use the golf course property are based
4 on the sublease. The parties disagree as to whether the CPGA DOA and the
5 Shoreline Management Permit amended the sublease's requirement that CPGC
6 operate a driving range. Yet, it is undisputed that the Corps is not a
7 party to the CPGC DOA and did not participate in approving the Shoreline
8 Management Permit. Accordingly, Columbia Park's owner - the United
9 States - did not authorize CPGC's RV project. Therefore, even though the
10 City Council issued the Shoreline Management Permit, the Court finds
11 CPGC's claimed right of pursuing the development outlined in the permit
12 is not a legitimate claim entitled to protection under the due process
13 clause. *C.f. 3883 Conn., LLC v. D.C.*, 336 F.3d 1068, 1074 (D.C. Cir.
14 2003) (no dispute that builder had right to build on that property).

15 c. Arbitrary and capricious

16 Because the Court concludes CPGC does not have a protectible
17 substantive due process interest to pursue developing its RV project at
18 the golf course location, the Court need not address whether Defendants'
19 decision to discontinue the RV project at the golf course location was
20 arbitrary and capricious.

21 d. Conclusion

22 Although the Court finds CPGC's substantive due process claim is not
23 barred by the Fifth Amendment, summary judgment in Defendants' favor on
24 the substantive due process claim is appropriate because CPGC does not
25 have a protectible property interest. Accordingly, CPGC's motion is
26 denied and Defendants' federal claims motion is granted in part.

1 3. Procedural Due Process

2 Two elements must be established to prove procedural due process
3 violation: (1) the existence of an interest protected by the due process
4 clause and (2) the inadequacy of the procedures provided. *Am. Mfrs. Mut.*
5 *Ins. Co. v. Sullivan*, 526 U.S. 527 (1999). Because the Court concluded
6 that CPGC does not have a protectible due process interest to pursue
7 developing its RV project at the golf course location, the Court grants
8 Defendants' motion as to the procedural due process claim. See *Indep.*
9 *Enterps.*, 103 F.3d at 1179-80.

10 4. No Impairment of Contract

11 Article I, § 10 of the U.S. Constitution states, "No State shall
12 . . . pass any . . . law impairing the obligation of contracts"
13 A governmental entity does not unconstitutionally impair a contract if
14 it takes a measure that leaves the other party with a breach of contract
15 damages remedy; rather, a claim exists under Article I, § 10 only if the
16 governmental entity extinguishes the contract remedy. *Hays v. Port of*
17 *Seattle*, 251 U.S. 233 (1920); *Horwitz-Matthews, Inc. v. City of Chicago*,
18 78 F.3d 1248 (7th Cir. 1996). For the reasons discussed below in
19 connection with Defendants' contract-related dispositive motion, the
20 Court finds triable issues of fact exist as to whether the Defendants'
21 actions extinguished CPGC's contract remedy. Defendants' federal claims
22 motion is denied in part.

23 5. Equal Protection

24 The Equal Protection Clause requires that "no state shall . . . deny
25 to any person within its jurisdiction the equal protection of the laws."
26 U.S. Constitution Amend. XIV § 1. There are two types of equal
protection claims. First, the plaintiff may allege that "defendants

1 acted with an intent or purpose to discriminate against the plaintiff
2 based upon membership in a protected class." *Barren v. Harrington*, 152
3 F.3d 1193, 1194-95 (9th Cir. 1998) (citing *Washington v. Davis*, 426 U.S.
4 229, 239-40 (1976)); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167
5 (9th Cir. 2005). Second, the plaintiff can establish an equal protection
6 "class of one" claim by alleging that it "has been intentionally treated
7 differently from others similarly situated and that there is no rational
8 basis for the difference in treatment." *Vill. of Willowbrook v. Olech*,
9 528 U.S. 562, 564 (2000). CPGC's equal protection claim is the latter.

10 CPGC contends it is the only developer who received a shoreline
11 permit and was not allowed to construct its project in the last five
12 years. Assuming this is true, the Court concludes CPGC failed to
13 establish a triable issue of fact as to whether Defendants lacked a
14 rational basis for not allowing CPGC to continue its RV project at the
15 golf course. Without commenting upon the appropriateness of the City
16 Council's ultimate decision, the Court concludes it was rational for the
17 City to consider public opinion in selecting the RV park's location.
18 "[T]here is nothing unusual or untoward in local government officials'
19 responsiveness to public opinion." *3883 Conn., LLC*, 336 F.3d at 1074.

20 6. Conspiracy to Violate Equal Protection

21 Because summary judgment in Defendants' favor is appropriate on
22 CPGC's equal protection claim, the Court also dismisses CPGC's 42 U.S.C.
23 § 1985(3) conspiracy to violate equal protection claim.

24 7. Estoppel and Accord and Satisfaction

25 The Court need not address Defendants' equitable estoppel and accord
26 and satisfaction arguments because the Court resolved the § 1983 claims
involving these doctrines in Defendants' favor.

1 8. Conclusion

2 CPGC has standing to assert its federal claims. However, absent the
3 impairment of contract claim, Defendants are entitled to summary judgment
4 in their favor on CPGC's substantive due process, procedural due process,
5 equal protection, and conspiracy to violate equal protection claims.
6 Accordingly, CPGC's motion is denied, and Defendants' federal claims
7 motion is granted and denied in part.

8 **C. Defendants' Motion for Summary Judgment Re: Contract Claims**

9 Defendants ask the Court to enter summary judgment in their favor
10 on all of CPGC's claims that "sound in contract" because CPGC cannot
11 prove the necessary elements of these claims. CPGC opposes the motion,
12 contending summary judgment is precluded due to the disputed material
13 facts. As explained below, the Court dismisses the promissory estoppel
14 claim but finds triable issues of material fact exist as to the other
15 contract-related claims.

16 1. Breach of Contract

17 CPGC is not arguing the City breached the sublease; rather, CPGC
18 argues the City breached the CPGC DOA by entertaining TRSF's development
19 proposal and precluding CPGC from proceeding with its RV project at the
20 golf course location.

21 A cause of action for breach of contract requires (1) a valid
22 contract, (2) a breach of the contract, and (3) damages resulting from
23 the breach. *Lehrer v. DSHS*, 101 Wn. App. 509, 516 (2000). Damages must
24 be proximately caused and flow naturally from the breach. *Lincor*
25 *Contractors, Ltd v. Hyskell*, 30 Wn. App. 317, 321 (1984).

26 It is undisputed that the CPGC DOA is a valid contract. The dispute
 centers around whether the City breached the CPGC DOA and, if so, whether

1 CPGC incurred any damages resulting from the breach. The CPGC DOA, in
2 pertinent part, states:

3 The City shall:

4 A. During the term of this agreement, refrain from making
5 further requests for proposals for development of a
6 recreational vehicle park, shoreline improvements, and boat
7 moorage within Columbia Park.

8 B. Shall not entertain or negotiate any alternate proposals
9 for development of a recreational vehicle park, shoreline
10 improvements, and boat moorage within Columbia Park during the
11 term of this Agreement.

12 C. Timely process all applications, permit requests, plan
13 reviews, and Site Plan approvals submitted by the *Developer* in
14 pursuit of this project.

15 (Ct. Rec. 89 Ex. C (emphasis in original.)) The City contends it did not
16 breach the CPGA DOA because (1) it did not entertain a proposal for
17 development of a RV park, shoreline improvements, *and* boat moorage within
18 Columbia Park because the TRSF proposal did not include all three of
19 these items and, even if it did include these items, the City did not
20 entertain TRSF's proposal and (2) it did not restrict CPGC from going
21 forward with its obligations under the CPGC DOA.

22 a. TRSF proposal

23 Defendants argue the use of the conjunctive language - "and" - in
24 the CPGC DOA indicates that the proposal must have included all three
25 items in order for the City to breach the CPGC DOA. The Court disagrees,
26 finding there is no ambiguity in this portion of the CPGC DOA. The CPGC
DOA's purpose was to grant CPGC "an exclusive option for the development
of a recreational vehicle park, shoreline improvements[,], and boat
moorage within Columbia Park." (Ct. Rec. 89 Ex. C.) The City's
entertaining of even one of these development projects would defeat the
purpose of this exclusive option agreement. Therefore, if the City

1 entertained a proposal to develop an RV park or shoreline improvements
2 or a boat moorage, the City would breach the CPGC DOA.

3 Next, the Court concludes CPGC presented sufficient evidence to
4 establish a genuine issue of material fact as to whether TRSF's proposal
5 included an RV park, shoreline improvements, and/or boat moorage. City
6 employee Bill King sent an email on November 7, 2005, regarding the TRSF
7 proposal and stated that the proposal included, amongst other
8 developments: a riverboat casino, boardwalk, cruise ship dock, and an
9 RV park; this email was circulated to a number of City employees,
10 including Bob Hammond. (Ct. Rec. 112 Ex. A.) Mr. Hammond responded that
11 it "sounds appropriate" for the City's joint-council committee to look
12 at the TRSF proposal. *Id.* Cindy Cole testified at her deposition that
13 she informed Mr. Beasley at the November 7, 2005 meeting that the City
14 would not entertain a proposal for an RV park. (Ct. Rec. 86 Ex. 2.)
15 However, Ms. Cole's deposition testimony did not indicate whether she
16 also told Mr. Beasley that the City had entered into an exclusive
17 agreement regarding shoreline improvements and boat moorage with another
18 entity. *Id.* In addition, CPGC presented evidence that the TRSF proposal
19 continued to include these sorts of developments following the November
20 7, 2005 meeting. (Ct. Rec. 112 Ex. B.) Plus, the Court notes the
21 February 21, 2006 TRSF DOA granted TRSF "an exclusive option for the
22 development of a multi-purpose community center within the western
23 portion of Columbia Park" and did not reference that this multi-purpose
24 community center development could not include an RV park, shoreline
25 improvements, or boat moorage. (Ct. Rec. 38 Ex. E.) Accordingly, the
26 Court finds triable issues of fact exist as to whether the TRSF proposal
included an RV park, shoreline improvements, and/or boat moorage.

1 Defendants argue that any conflict between the CPGC DOA and the TRSF
2 DOA must be resolved in favor of the City because these two options were
3 prepared by the same law firm. Defendants cite to *Sandstone Court of*
4 *Bellevue, LLC*, 148 Wn.2d 654, 666 (2003), and *Hill v. Department of Labor*
5 *and Industries*, 90 Wn.2d 276, 279 (1978), to support this argument. In
6 *Hill*, the Washington Supreme Court recognized that “[k]nowledge by the
7 attorney is imputed to the client.” This is true; however, Defendants
8 have only claimed that the same *law firm*, not the same attorney, drafted
9 the DOAs. (Ct. Rec. 126 ¶ 18.) Accordingly, the Court does not have
10 sufficient evidence that the same attorney prepared the DOAs, or
11 represented both CPGC and TRSF. In *Sandstone*, the Washington Supreme
12 Court commented upon an attorney’s responsibility to inform his client
13 as to the legal effect of a document. 148 Wash. 2d at 664. Even if the
14 same attorney prepared the DOAs, the City failed to explain how that
15 attorney would have an obligation to notify the City of the conflict
16 between the two documents. TRSF’s obligations under its DOA did not
17 expose it to liability against CPGC; rather, it was the City that was
18 potentially in a precarious position by entering into two DOAs.

19 The next question is whether the City entertained the TRSF proposal.
20 The City contends the TRSF did not have specific development plans.
21 However, the broadly-worded CPGC DOA restricted the City from
22 “entertain[ing] or negotiat[ing] any alternate proposals for development
23 of a recreational vehicle park, shoreline improvements, and boat moorage
24” (Ct. Rec. 89 Ex. C p. 2.) The Court finds CPGC presented
25 sufficient evidence to establish triable issues of fact as to whether the
26 City entertained or negotiated any alternate proposals for development
of an RV park, shoreline improvements, and boat moorage.

1 Defendants contend, regardless of whether a breach occurred, CPGC's
2 breach of contract cause of action must be dismissed because CPGC failed
3 to present sufficient evidence that it incurred damages that were
4 proximately caused by the TRSF proposal. A prevailing party is entitled
5 to recover those damages that will put it in the position it would have
6 been in had the contract been performed. *Eastlake Constr. Co. v. Hess*,
7 102 Wn.2d 30, 46 (1984). Because of the synergistic-financial
8 relationship between the golf course, RV park, and club house restaurant,
9 the Court finds it is a question for the jury whether CPGC's claimed lost
10 income is proximately caused by Defendants' alleged breach.⁵

11 For the above reasons, Defendants' motion to dismiss CPGC's breach
12 of contract cause of action related to the TRSF proposal is denied.

13 b. CPGC DOA vitality

14 Defendants also argue the City did not breach the CPGC DOA when it
15 disallowed the RV project at the golf course because the CPGC DOA did not
16 guarantee final project approval. As explained below, the Court agrees
17 to the extent that the CPGC DOA did not guarantee final project approval
18 of an RV park at the golf course; however, the jury is to determine
19 whether Defendants' conduct violated the implied covenant of good faith
20 and fair dealing.

21 The CPGC DOA did not set forth a specific location for the RV park
22 within Columbia Park; rather, the CPGC DOA required CPGC to:

23
24
25 ⁵ If the City is found to have materially breached the CPGC DOA,
26 this breach suspended CPGC's obligations under the CPGC DOA. See
Highlands Plaza, Inc. v. Viking Inv. Corp., 72 Wn.2d 865, 876-77 (1967).
ORDER * 15

1 A. Provide a development plan to the *City*, working with the
2 *City* staff, appropriate agencies and commissions to submit for
3 permitting, a project Site Plan.

4 B. Pursue during the term of this Agreement, Site Plan
5 approval from all required agencies.

6 C. Upon final Site Plan approval, construct the development
7 in accordance with the approved Site Plan and specifications.

8 (Ct. Rec. 89 Ex. C (emphasis in original.)) Therefore, the location of
9 the RV park was to be selected through the Site Plan.

10 CPGC satisfied obligation "A" by submitting a Shoreline Management
11 Permit application to the City. The application was presented to the
12 City Council through Resolution No. 06-14. Resolution No. 06-14 states:

13 The application has required a Shoreline Management Permit for
14 renovations to the Columbia Park Golf Course with the addition
15 of an RV Park/Campground. The work will be to replace an
16 existing 4,000 square foot clubhouse with a new 6,000 square
17 foot clubhouse, add two new pavilions, restroom/shower
18 facilities, and recreational vehicle and automobile parking
19 spaces.

20 (Ct. Rec. 67 Ex. C.) The minutes from the May 2, 2006 City Council
21 Meeting indicate that a similar oral description of the project was given
22 during the meeting. (Ct. Rec. 78 Ex. 1.)

23 Defendants argue the City Council members approved Resolution No.
24 06-14 because they believed passage did not equal final approval of the
25 RV project at the golf course. (Ct. Rec. 122: Beaver Decl.; Ct. Rec.
26 123: Moak Decl.; Ct. Rec. 124: Parrish Decl.; Ct. Rec. 125: Parks Decl.)
The voting City Council members declared that they relied upon CPGC's
counsel Lee Kerr's silence following the City staff members' statements
that revising the sublease was not before the Council at that meeting,
but rather would be addressed later. The City Council members also state
that they relied upon Mr. Kerr's statement that the Council was not to
determine at that meeting whether the RV project was at the best

1 location.⁶ Yet, the express language of Resolution No. 06-14, and the
2 oral summary, stated that the RV project was to occur at the golf course.
3 After reviewing all of the submitted evidence, the Court finds triable
4 issues of material fact exist as to what the City Council members'
5 intended by approving Resolution No. 06-14.⁷ See *Anderson Hay & Grain*

6
7 ⁶ The Court finds Mr. Kerr's "wise project" or "best location"
8 statements were taken out of context. Mr. Kerr's statement was:

9 Now the planning commission had a very, very limited scope and
10 that's what you're doing, you're looking at their very limited
11 scope that the planning commission had and that is is [sic]
12 under our shorelines management ordinance which mirrors the
13 state statute and the determination is whether this is a
14 substantial development which will materially interfere with
15 the normal public use of the adjacent waters and shorelines and
16 so the question is not if this is a good project or not even
17 is this [sic] at the right location, but whether or not this
18 project is, as represented to you, will substantially or
19 materially interfere with the existing public use of its
20 shorelines and as you can see, the planning commission I think
21 looked probably more to the wisdom of the project and I think
22 as you can see there are a number of different opinions on
23 whether or not this is a wise project or this is the best
24 location for this project and I think rather than looking at
25 the scope of the particular question that they were charged
26 with, and that same question is present before the Council, I
think they it literally [sic] looked and decided the wrong way.

(Ct. Rec. 78 Ex. 1 p. 16.)

21 ⁷ Defendants argue, because of Mr. Kerr's statements and omissions
22 at the hearing, CPGC should be equitably estopped from arguing that the
23 passage of Resolution 06-14 constituted final RV project approval. The
24 Court concludes the jury should hear this evidence to determine whether
25 equitable estoppel applies. See *Shows v. Pemberton*, 73 Wn. App. 107,
26 110-11 (1984); *McDaniels v. Carlson*, 108 Wn.2d 299, 308-09 (1987).

1 *Co. v. United Dominion Indus.*, 119 Wn. App. 249 (2003) (noting that what
2 the parties intend is a question of fact).

3 If the jury finds that the City Council understood that Resolution
4 No. 06-14 granted CPGC permission from the City to replace the driving
5 range with an RV park, the Court concludes, as a matter of law, that
6 approving Resolution No. 06-14 did not remove the requirement that the
7 sublease be amended and approved by the Corps. CPGC failed to submit any
8 evidence that the CPGC DOA and Shoreline Management Permit removed the
9 sublease's requirement that the Corps approve any lease in connection
10 with Columbia Park property. (Ct. Rec. 38 Ex. A ¶ 2.9; Ct. Rec. 87 Ex.
11 3 ¶ 13.a.) Therefore, passing Resolution No. 06-14 did not constitute
12 "final approval" of the RV project. Accordingly, the City did not breach
13 an express term of the CPGC DOA when it prevented the RV project from
14 being located at the golf course location.

15 Nonetheless, the City was contractually obligated to abide by the
16 agreed upon terms in the CPGC DOA. If the jury concludes that the City
17 Council understood that Resolution No. 06-14 was to develop an RV park
18 at the golf course location, then the City and CPGC agreed upon a "Site
19 Plan." Therefore, although Defendants' post-May 2, 2006 conduct did not
20 breach a specific section of the CPGC DOA, the jury could determine this
21 conduct constituted bad faith as explained below.

22 c. Implied Covenant of Good Faith and Fair Dealing

23 An implied covenant of good faith and fair dealing is part of every
24 contract. "This duty obligates the parties to cooperate with each other
25 so that each may obtain the full benefit of performance." *Badgett v.*
26 *Sec. State Bank*, 116 Wn.2d 563, 569 (1991). Therefore, "[w]here the
terms of a contract are literally complied with but one party to the

1 contract deliberately contravenes the intention and spirit of the
2 contract, that party can incur liability for breach of the implied
3 covenant of good faith and fair dealing." *Hilton Hotels Corp. v.*
4 *ButchLewis Prods.*, 107 Nev. 226, 232-34 (1991).

5 The City had an obligation to carry out its contractual obligations
6 in good faith and to deal fairly with CPGC. The purpose of the CPGC DOA
7 was to allow CPGC the exclusive right to pursue the described development
8 project consistent with the agreed upon Site Plan. If the jury finds
9 that the parties agreed upon a Site Plan, then the jury must then
10 determine whether Defendants' post-May 2, 2006 conduct breached the duty
11 of good faith and fair dealing. In addition, triable issues of fact
12 exist as to whether Defendants breached the implied covenant of good
13 faith and fair dealing by entertaining TSRF's proposal.

14 d. Accord and Satisfaction

15 Defendants contend CPGC's claims are barred by accord and
16 satisfaction because the City extended the CPGC option and the parties'
17 continued lease negotiations following the City's decision to not proceed
18 with the RV project at the golf course location. To constitute a binding
19 accord and satisfaction there must be (1) a bona fide dispute, (2) an
20 agreement to settle that dispute and then (3) performance of that
21 agreement. *Eagle Ins. Co. v. Albright*, 3 Wn. App. 256, 271 (1970). The
22 Court finds CPGC presented sufficient evidence and create a genuine issue
23 of material fact that the parties did not reach an agreement to settle
24 their dispute regarding the location of the RV park. Defendants' motion
25 is denied in part.

26 ///

1 2. Promissory Estoppel

2 Defendants maintain that the relationship between the parties is
3 governed by contracts and, therefore, CPGC cannot bring a promissory
4 estoppel action. The Court agrees; because the parties' relationship is
5 governed by the sublease, the CPGC DOA, and the Shoreline Management
6 Permit, CPGC's promissory estoppel cause of action is dismissed. See
7 *Walker v. KFC Corp.*, 728 F.2d 1215, 1220 (9th Cir. 1984); *Klinke v.*
8 *Famous Recipe Fried Chicken*, 94 Wn.2d 255, 261 n.4 (1980).

9 3. Unjust Enrichment and Quantum Meruit

10 Defendants argue CPGC cannot prove unjust enrichment because CPGC
11 did not confer any benefit on the City, other than its contractually-
12 obligated performance. Although the Complaint seeks recovery under both
13 unjust enrichment and quantum meruit, Defendants' motion only referenced
14 unjust enrichment. However, in light of the recent Washington Supreme
15 Court decision, *Young v. Young*, 191 P.3d 1258 (Wash. 2008), the Court
16 discusses both claims and concludes that CPGC cannot pursue either unjust
17 enrichment or quantum meruit.

18 CPGC cannot pursue unjust enrichment because the parties'
19 relationship is governed by contract. See *id.* at 1261-62. Although
20 quantum meruit possibly could be pursued even though the parties entered
21 into a contract, CPGC cannot pursue quantum meruit because the Complaint
22 does not allege that CPGC engaged in extra work outside of the contract.
23 See *id.* Accordingly, the Court finds CPGC may not pursue either unjust
24 enrichment or quantum meruit; Defendants' motion is granted in part.

25 4. Conclusion

26 _____ Triable issues of material fact exist as to whether the City
breached the CPGC DOA, breached the covenant of good faith and fair

1 dealing implied in the CPGC DOA. The Court dismisses CPGC's promissory
2 estoppel cause of action and unjust enrichment and quantum meruit claims.
3 Accordingly, Defendants' Motion for Partial Summary Judgment on Contract
4 Claims is granted and denied in part.

5 For the above given reasons, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Partial Summary Judgment Re: Violation
7 of 42 U.S.C. § 1983 (**Ct. Rec. 66**) is **DENIED**.

8 2. Defendants' Motion for Partial Summary Judgment on Federal
9 Claim (**Ct. Rec. 79**) is **GRANTED** (due process claims; equal protection
10 claims) **and DENIED** (standing and contractual interference claim) **IN PART**.

11 3. Defendants' Motion for Summary Judgment Re: Contract Claims
12 (**Ct. Rec. 82**) **GRANTED** (promissory estoppel, unjust enrichment, and
13 quantum meruit) **and DENIED** (breach of contract; breach of the implied
14 covenant of good faith and fair dealing) **IN PART**.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter
16 this Order and provide copies to counsel.

17 **DATED** this 5th day of November 2008.

18
19 S/ Edward F. Shea
20 EDWARD F. SHEA
United States District Judge

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